

DOCUMENT RESUME

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[Improper Procurement Procedures]. B-188427. September 22, 1977.
9 pp.

Decision re: Spacesaver Corp.; by Robert F. Keller, Deputy
Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law II.
Budget Function: General Government; Other General Government
(806).

Organization Concerned: Immigration and Naturalization Service;
Sperry Rand Corp.; Sperry Univac Federal Systems Div.

Authority: 41 U.S.C. 252(c)(2). F.P.R. 1-3.805-1. B-186939
(1977). E-183739 (1975). B-188387 (1977). 55 Comp. Gen. 201.
56 Comp. Gen. 448. Reco Industries v. United States, 482
F.2d 1233 (Ct. Cl. 1970).

The protester objected to the award of a contract for an electronic shelf filing cabinet system. The figure used to calculate the load stress of the floor under the proposed filing equipment was different from that set forth in the request for proposals; the failure to amend the request for proposals to indicate the change and permit offerors to submit revised proposals was improper. The award on the initial proposal basis, without discussions, was improper since there was technical uncertainty regarding the floor load stress. The offeror was not entitled to proposal preparation costs because it did not appear that the offeror would have received the award except for the Government's action. (Author/SC)

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DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-168427

DATE: September 22, 1977

MATTER OF: Spacesaver Corporation

DIGEST:

1. When figure used to calculate load stress of floor under proposed filing equipment is different from that set forth in RFP, failure to amend RFP to indicate change and permit offerors to submit revised proposals is improper.
2. Award on initial proposal basis, without discussions, is improper where technical uncertainty regarding floor load stress, which was caused by agency's use of different figure in evaluating floor stress from that set forth in RFP, existed.
3. Offeror is not entitled to proposal preparation expenses where it does not appear offeror would have received award but for Government's action.

Spacesaver Corporation (Spacesaver) protests the award of a contract to Sperry-Univac (Sperry), a division of Sperry Rand Corporation, for an electronic, movable, high-density, shelf filing cabinet system under request for proposals (RFP) No. CO-20-77 issued by the United States Department of Justice, Immigration and Naturalization Service (INS). The filing system is to be used by INS in its new headquarters on the fourth floor of 26 Federal Plaza Annex, a Federal office building operated and maintained by the General Services Administration (GSA).

The protest as originally filed raised several issues. However, this matter has been narrowed to the point where the protest is based substantially on Spacesaver's contentions that the agency improperly failed to conduct negotiations with the offerors, misled offerors by failing to evaluate proposals according to the 170 pounds per square foot (psf) maximum floor load capacity of the reinforced area as set forth in the RFP and permitted Sperry to gain a competitive advantage due to pre-solicitation discussions held with that firm.

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The record indicates that during the period of July 1976 through December 1976 (prior to the issuance of the subject RFP) discussions were held within INS regarding the impact of the reduced floor space which would be available to INS in the new facility for its Records Administration and Information Branch which is responsible for maintaining voluminous alien files. Although it appears that INS was considering some kind of movable high-density shelf filing equipment that agency was unable to answer inquiries from GSA as to the specifics of the system to be installed, GSA was interested in knowing the manufacturer, and empty and loaded weights of the equipment in order for it to determine whether the installation site needed reinforcement.

In October 1976 GSA advised INS that it could no longer wait and suggested to INS that structural reinforcement be added to the fourth floor in the same fashion and configuration as that used by the Environmental Protection Agency which occupies the eighth floor of the building. INS agreed and the result was the addition of structural reinforcement which was designed to accommodate the Sperry "Elecompac" filing system. GSA maintains that structural reinforcement of the same nature would have been required for any other high-density file system. In this regard GSA states that it had discussions with Sperry, regarding the need for reinforcement. According to GSA, Sperry representatives unsuccessfully attempted to convince GSA's engineering consultant that the Sperry system would not require floor reinforcement.

Subsequently, on January 18, 1977 INS was formally advised by GSA that INS was to move into 26 Federal Plaza by March 23, 1977. INS was also requested to proceed with the purchase of a filing system. Four suppliers holding Federal Supply Schedule (FSS) contracts offered the type of file systems that would be needed. However, the magnitude of the proposed procurement (\$400,000 - \$500,000) was such that it exceeded the \$150,000 "Maximum Order Limitation" (MOL) applicable to that category of equipment. By letter dated January 19, 1977 INS requested that GSA waive the MOL so that INS could discuss its requirements directly with the various FSS suppliers and that GSA authorize INS to place an order directly with the supplier offering the best delivery and installation schedule. GSA

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advised INS that the requested waiver could not be granted and suggested that INS negotiate its requirement under the public exigency authority of 41 U.S.C. § 252(c)(2) (1970).

Accordingly, a Determination and Findings was issued which stated, in pertinent part, that although INS had access to temporary quarters at a cost of \$120,500 for six months commencing March 23, 1977, INS desired that the filing equipment be delivered, assembled and made ready for inspection and acceptance by March 23 or as soon thereafter as possible.

The RFP was issued on January 26, 1977, with a closing date of February 4, 1977. Under "System Requirements" the RFP provided the following information to potential offerors:

"The system is to be electronically activated and will be installed over approximately 8,200 square feet of structurally reinforced space on the 4th floor at 26 Federal Plaza (Annex). The 4th floor consists of 12,500 square feet of actual floor space; the structurally reinforced portion has a load rating of 170 pounds per square foot, and the non-reinforced portion has a load rating of 120 pounds per square foot.

* * * * *

"Incorporated in this solicitation are two (2) scale plans of the 4th floor which show (i) the basic floor plan and the Government's desired furniture layout, and (ii) the area of the floor which has structurally reinforced beams. The floor plans provided shall be used for developing final layout design." (emphasis supplied).

The RFP also contained a provision requesting the submission of two proposals per offeror which read in pertinent part as follows:

4. PREPARATION OF PROPOSALS: Each offeror is requested to furnish two (2) proposals. The first, or 'Primary Proposal', for delivery and assembly of a system by the aforementioned March 23, 1977 move-in date. The second, or

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'Secondary Proposal', for delivery and assembly of a system by May 6, 1977. Proposals may be submitted that offer systems after March 23, 1977 and May 6, 1977, respectively, but they will be reduced in point value (score) pursuant to the evaluation criteria set forth in Clause No. 5, METHOD OF AWARD.

Each proposal shall be clearly identified as being either 'Primary' or 'Secondary'. The determination by an offeror to submit only one proposal, either 'Primary' or 'Secondary' will result in their receiving consideration for only their preferred performance period. All proposals shall include the following:

- A. * * *
- B. * * *
- C. An engineering drawing showing relationship between proposed installation and structural reinforcement added to the site.
- D. A separate drawing showing subfloor design, system track and electrical requirements, office furnishing layout, etc."

The RFP contained the following methodology for determining the successful offeror:

"5. METHOD OF AWARD: The Government reserves the right to make the award to that firm whose proposal is deemed most advantageous, cost and other factors considered. The evaluation criteria set forth below will be utilized by the Government to assist in determining which proposal is most advantageous from the standpoint of cost, and such other factors as time and understanding of the requirement.

Both the 'Primary' and 'Secondary' proposals will be subjected to the following evaluation criteria:

- A. Proposal (1-15 Points): Offerors overall approach, explicitness of proposal, understanding of requirements and best utilization of available space; i.e., maximum utilization of structurally reinforced area, subflooring design, providing for sufficient aisles, adequacy of supplemental lighting, ease of operation, engineering drawings, etc.
- B. SYSTEM COST, DELIVERED AND ASSEMBLED (1-25 POINTS): Evaluation of cost will be computed by multiplying the maximum point score available by the fraction representing the ratio of the lowest price to the particular supplier's proposed price * * *.
- C. Delivery/Assembly Schedule (1-60 Points): Separate schedules should be provided for the 'Primary' and 'Secondary' proposals, and each will be evaluated on the basis of the Government's desired delivery/assembly; i.e., March 23, 1977 and May 7, 1977, respectively. Schedules complying with the Government's desired delivery/assembly time frames will receive the maximum number of points. * * *

On February 4, 1977, all four of the suppliers listed on the FSS submitted offers. Three of the offerors submitted both "Primary" and "Secondary" proposals, while Sperry chose to submit only a "Secondary" proposal. INS's record of evaluation of the "Primary" and "Secondary" proposals resulted in the following scores and final standings:

"1. 23 March 1977

Offeror	Opt/Plan	Prop	Scores Assigned through Evaluations				Final Stand
			Del/As	Tot Tech	Price	Total	
Estay	N/A	5.37	60.0	65.237	23.84	89.077	1
Supreme	#1	4.838	60.0	64.838	23.07	87.908	2
Supreme	#2	4.838	60.0	64.838	23.07	87.908	2
Spacesaver*	A	9.027	46.0	55.027	25.0	80.027	3
Spacesaver*	B	9.154	46.0	55.154	24.79	79.944	4

*Spacesaver system offered by 30 March 1977; pursuant to Article 5 of RFP, they lose 14.0 points - 2.0 points for each calendar day beyond 23 March 1977.

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"2. 6 May 1977

<u>Offeror</u>	<u>Opt/Plan</u>	<u>Prop</u>	<u>Scores Assigned through Evaluations</u>				<u>Final Stand</u>
			<u>Del/As</u>	<u>Tot Tech</u>	<u>Price</u>	<u>Total</u>	
Sperry	N/A	14.574	60.0	74.574	15.692	91.266	1
Estey	N/A	5.237	60.0	65.237	25.0	90.237	2
Spacesaver	B	9.154	60.0	69.154	15.691	84.845	3
Spacesaver	A	9.027	60.0	69.027	15.82	83.847	4
Supreme	#1	4.838	60.0	64.838	14.42	79.258	5
Supreme	#2	4.838	60.0	64.838	14.42	79.258	5"

The evaluation record contains the following award recommendation:

- "1. Award of a contract to Sperry-Univac is recommended for the following reasons:
 - a. Filing systems offered by Estey, Supreme, and Spacesaver will overstress the dunnage beams on the 4th Floor at the FOB according to the GSA/Region 2 Construction Branch.
 - b. The Service Evaluation Team determined that the system offered by Sperry-Univac was technically superior to all other systems in terms of stability, lighting, motors, rails, gear mechanisms, construction, safety features, ease of operation, sustained file access, service and overall dependability.
- "2. The total package price of the system offered by Sperry-Univac is \$411,795.00, * * *."

The record also indicates that negotiations were not conducted with any of the offerors because:

- "A. The individuals invited to the pre-solicitation conference in NYC were responsible for negotiating contracts with GSA on behalf of their employers.
- "B. The RFP contained a notice that award might be made on the basis of initial proposals received.
- "C. The procurement and subsequent delivery/assembly time frames were of short duration, and precluded such discussions/negotiations.

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"D. The procurement resulted in adequate price competition, and was supported by prior cost experience (GSA Federal Supply Schedule).

"The foregoing completely satisfies the requirements of FPR 1-3.805-1(a)(3) and (5)."

Spacesaver insists that it was denied an equal opportunity to compete for the award because of misleading information contained in the RFP combined with the lack of negotiation with all offerors and Sperry's superior knowledge of the requirement.

We are initially concerned that the evaluation of the stress to be exerted on the floor by the various offerors' systems did not comport with the procedure for such evaluation set forth in the RFP. The RFP states that the reinforced portion of the floor has a load rating of 170 psf. This 170 psf figure was repeated on the drawings included in the RFP. It is clear from the record that GSA (GSA conducted this portion of the evaluation) did not use the 170 psf figure but used lesser figures (125-130 psf) in its calculations which led it to conclude that all the equipment offered except Sperry's would overstress the reinforced portion of the floor. As shown in the portion of the evaluation record cited above GSA's recommendation in this regard had a significant impact on the award selection. In fact, INS in a letter submitted to this Office in connection with the protest indicated that it considered all the offerors other than Sperry "nonresponsive" because of the floor stress factor.

However, GSA argues that the 170 psf figure used in the drawing contained in the RFP was not intended to connote the maximum floor capacity but was merely a notation indicating the average load under the file equipment. While there are some notations on the drawing regarding the size of the reinforced floor beams they certainly do not clearly explain that the 170 psf figure is merely intended to represent an average load under the equipment. Further, and most importantly, GSA's argument makes no mention of the statement under the "Systems Requirements" section of the RFP that "the structurally reinforced portion has a load rating of 170 pounds per square foot * * *." We think it was reasonable for offerors to conclude from the RFP that the reinforced floor stress factor was to be 170 psf.

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It is basic that in a negotiated procurement the RFP must inform offerors of the factors on which the award decision will be based. It follows that if during the course of the procurement the stated needs of the Government change substantially, that fact must be communicated to offerors. Federal Procurement Regulations (FPR) § 1-3.805-1(d) (1964 ed. amend 153).

Here the RFP stated that the 170 psf figure would be used to evaluate floor stress when, in fact, other figures were used and the record contains no indication that this fact was ever communicated to the offerors. When it was decided that the 170 psf figure would not be used in the evaluation it was incumbent upon INS to clearly inform all offerors of that fact and to provide them all with the opportunity to submit amended proposals. International Finance and Economics, B-186939, January 27, 1977, 77-1 CPD 66. Although the calculations used by GSA are the subject of considerable dispute because of its use of the 125-130 psf figures as well as for other more technical reasons the possibility remains, as Spacesaver contends, that its equipment may well have been considered as meeting the stress requirements if the 170 psf figure had been used in the evaluation. Similarly since GSA reinforced the flooring using Sperry's equipment as the model and since Sperry had the advantage over other offerors by engaging in, at least, preliminary conversations with GSA personnel regarding the floor stress factor we think it was especially unfair to the offerors other than Sperry that the figure actually used by GSA in the critical evaluation was not revealed.

It follows, of course, that INS's awarding of the contract to Sperry, without discussions, on an initial proposal basis was improper. Although in certain instances it is appropriate to award a negotiated contract without written or oral discussions it is not proper to award a contract on this basis where an uncertainty exists as to a technical aspect of the proposals. (FPR 1-3.805-1(a) (5) (1964 ed. amend 153)). In this case the agency felt that it was certain that all the equipment except that proposed by Sperry would not meet the floor stress requirements. However, since the offers were prepared based on a figure different from that used in the evaluation an uncertainty existed as to whether the offerors had proposed equipment which would have met the stress requirements actually set forth in the RFP or whether they could have, if informed of the figure, proposed equipment meeting the stress requirements as calculated using the unannounced figures. A situation such as this presents an improper basis upon which to award a contract without

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discussion. See generally Corbetta Construction Company of Illinois, Inc., 55 Comp. Gen. 201 (1975), 75-2 CPD 144.

Spacesaver has requested that we grant it relief in the form of bid preparation costs.

Our Office will allow the recovery of bid or proposal preparation expenses under certain circumstances. Amram Nowak Associates, Inc., 56 Comp. Gen. 448 (1977), 77-1 CPD 219. Basically, recovery will be allowed where the Government acted arbitrarily, capriciously or in bad faith with respect to a claimant's bid or proposal. Keco Industries v. United States, 432 F. 2d 1233 (Ct. Cl. 1970). Further, we have only allowed the recovery of bid or proposal preparation costs where the Government's action was "so arbitrary or capricious as to preclude a particular bidder from an award to which it was otherwise entitled." Ampex Corporation et al., B-183739, November 14, 1975, 75-2 CPD 304.

In this case, although INS improperly failed to inform all offerors of the correct figure to be used in the evaluation of an important factor, the record indicates that Sperry's proposal received a significantly higher overall score than Spacesaver's and was considered superior under factors unrelated to the floor stress factor. Accordingly, it is unclear that Spacesaver would have been entitled to the award even if the proper floor stress factor had been included in the RFP. Therefore, we do not believe it appropriate to grant the relief requested. Morgan Business Associates, B-188387, May 16, 1977, 77-1 CPD 344.

Although we are sustaining the protest, because it is our understanding that performance of the subject contract is substantially complete, no useful purpose would be served by recommending that it be terminated for convenience.

Deputy

R. F. K. Kim
Comptroller General
of the United States